**IN THE COURT OF APPEALS**

**FIRST APPELLATE DISTRICT OF OHIO**

**HAMILTON COUNTY, OHIO**

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| SAMANTHA HALEY, | : | APPEAL NO. C-150334<br>TRIAL NO. A-1208038 |
| Plaintiff-Appellant, | : | *JUDGMENT ENTRY.* |
| vs. | : | |
| BENJAMIN TALLARIGO, | : | |
| and | : | |
| JOANNE TALLARIGO, | : | |
| Defendants-Appellees, | : | |
| and | : | |
| TALLARIGO PROPERTIES, | : | |
| Defendant. | : | |

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiff-appellant Samantha Haley filed a negligence complaint against defendants-appellees Benjamin and Joanne Tallarigo, her landlords, seeking to recover damages for injuries she sustained when she fell after slipping on an uneven step in a common area of the leased premises. When the Tallarigos failed to answer, Haley moved for default judgments against them. The Tallarigos filed a motion for leave to answer out of time, which the trial court granted. Subsequently, the trial court granted the Tallarigos' motion for summary judgment on the basis that the hazardous condition was open and obvious. This appeal followed.

In her first assignment of error, Haley contends that the trial court erred in granting the Tallarigos' motion for summary judgment. She argues that the open-and-obvious doctrine does not apply in this case. She further argues that even if it does apply, genuine issues of fact exist for trial as to whether the hazard was open and obvious. This assignment of error is not well taken.

The Ohio Supreme Court has held that a property owner has no duty to warn individuals lawfully on the property of dangers that are open and obvious. *Armstrong v. Best Buy*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, syllabus; *Esterman v. Speedway, LLC*, 1st Dist. Hamilton No. C-140287, 2015-Ohio-659, ¶ 6. But a landlord owes statutory duties to a tenant under R.C. Chapter 5321. Generally, the open-and-obvious doctrine will not protect a landlord from breaches of the landlord's statutory duties. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 21-25; *In re V.R.*, 1st Dist. Hamilton No. C-140230, 2014-Ohio-5061, ¶ 10-11.

Haley argues that the Tallarigos (1) failed to comply with all applicable building codes, (2) failed to make repairs and do all that was reasonably necessary to keep the premises in a fit and habitable condition, and (3) failed to keep all common areas in a safe condition as required by R.C. 5321.04(A). The only evidence she presented supporting these allegations was an expert's report concluding that the condition of the stairs violated several provisions of the Ohio Basic Building Code and other various building and safety codes.

The trial court stated that it did not consider the report because it was unreliable and it was filed past the discovery deadline. The trial court has broad discretion in regulating discovery. *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶ 11; *Weckle v. Cole + Russell Architects*, 2013-Ohio-2718, 994 N.E.2d

885, ¶ 25 (1st Dist.). The record shows that the report was not filed until several months after the date the court had set for completion of discovery. The trial court did not erroneously deny or limit discovery, and its failure to consider the report was not an abuse of discretion. *See Mauzy v. Kelly Serv., Inc.,* 75 Ohio St.3d 578, 592, 664 N.E.2d 1272 (1996); *Weckle* at ¶ 25.

Without evidence of a statutory violation, the open-and-obvious doctrine still applies. *See Robinson*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, at ¶ 25; *V.R.* at ¶ 11. An open-and-obvious danger is not latent or concealed and is discoverable upon ordinary inspection. *Ahmad v. AK Steel Corp*., 119 Ohio St.3d 1210, 2008-Ohio-4082, 892 N.E.2d 1287, ¶ 25; *Esterman*, 1st Dist. Hamilton No. C-140287, 2015-Ohio-659, at ¶ 7. In slip-and-fall cases, courts have determined that a person does not actually have to see the dangerous condition prior to the fall for it to be open and obvious. Courts have found that no duty to warn existed where the condition could have been seen had a person looked. *Esterman* at ¶ 7.

Haley stated in her deposition that she had lived in the building for three weeks and that she knew the step was there. She acknowledged that nothing was blocking her view of the step. The record shows that it was discoverable upon an ordinary inspection. Further, no attendant circumstances existed that would have distracted Haley's attention and reduced the degree of care that an ordinary person would have exercised. *See Esterman* at ¶ 11; *Martin v. Christ Hosp*., 1st Dist. Hamilton No. C-060639, 2007-Ohio-2795, ¶ 17-20. Haley claimed that the lighting was dim, but dim lighting around a stairway is a circumstance regularly encountered and should increase the care a reasonable person would exercise. *See Esterman* at ¶ 13.

The Tallarigos, the moving parties, met their initial burden to show that the defect was open and obvious. Once they met that burden, Haley had a reciprocal burden to set forth specific facts showing that a genuine issue of fact existed for trial. *See Drescher v. Burt*, 75 Ohio St.3d 280, 293-294, 662 N.E.2d 264 (1996); *Stinespring v. Natorp Garden Stores, Inc.*, 127 Ohio App.3d 213, 216, 711 N.E.2d 1104 (1st Dist.1998). She failed to meet that burden.

"Where the hazardous condition is not hidden from view or concealed and is discoverable by ordinary inspection, the court may properly sustain a summary judgment motion against the claimant." *Martin* at ¶ 19. We find no issues of material fact. Construing the evidence most strongly in Haley's favor, we hold that reasonable minds can come to but one conclusion—that the defect was open and obvious, and therefore, the Tallarigos had no duty to warn Haley about the danger. The Tallarigos were entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment in their favor. *See Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977); *McLean*, 1st Dist. Hamilton No. C-150651, 2016-Ohio-2953, at ¶ 12. Therefore, we overrule Haley's first assignment of error.

In her second assignment of error, Haley contends that the trial court erred in allowing the Tallarigos to file their answer out of time. She argues that they failed to show that their failure to answer was the result of excusable neglect. This assignment of error is not well taken.

The decision whether to grant the motion for leave to file the answer was within the trial court's discretion. *See Miller v. Lint*, 62 Ohio St.2d 209, 214, 404 N.E.2d 752 (1980); *Levy v. Univ. of Cincinnati*, 84 Ohio App.3d 342, 345-346, 616 N.E.2d 1132 (1st Dist.1992). In ruling on the motion, the court must consider all of the surrounding facts

and circumstances and must "remain mindful of the admonition that cases should be decided on their merits." *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 271, 533 N.E.2d 325 (1988).

The record shows that the Tallarigos presented sufficient facts to the court to support its finding of excusable neglect. *See id.*; *Levy* at 345-346. Under the circumstances, we cannot hold that the trial court's decision to grant the Tallarigos' motion was so arbitrary, unreasonable or unconscionable as to connote an abuse of discretion. *See Ruwe v. Bd. of Spingfield Twp. Trustees*, 29 Ohio St.3d 59, 61, 505 N.E.2d 957 (1987); *Levy* at 346. We, therefore, overrule Haley's second assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**MOCK, P.J., CUNNINGHAM** and **ZAYAS, JJ.**

To the clerk:

Enter upon the court's journal on _____
by order of the court _____.

Presiding Judge